

IN THE SUPREME COURT  
OF THE UNITED STATES

No. 93 6497

3

Supreme Court, U.S.

FILED

OCT 26 1993

OFFICE OF THE CLERK

**FRANK BASIL MCFARLAND**

**Petitioner,**

**-v-**

**JAMES A. COLLINS,  
Director, Texas Department  
of Criminal Justice,  
Institutional Division,**

**Respondent.**

**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

Petitioner, **FRANK BASIL MCFARLAND**, submits the following supplement to his previously lodged (and subsequently filed) petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. As stated in the original petition, this supplement is necessary in view of the fact that the original petition was written before, albeit in anticipation of, a denial of relief by the Court of Appeals. The Court of Appeals opinion is attached hereto as **Appendix A**.

12 pp

**I. THE COURT OF APPEALS'S DECISION HAS  
CREATED A SHARP CIRCUIT SPLIT THAT REQUIRES  
THE IMMEDIATE ATTENTION OF THIS COURT .**

"If a district court can appoint counsel to represent a death penalty habeas petitioner, surely it can issue a stay of execution when necessary to make the appointment and allow appointed counsel reasonable time to do his job. Otherwise, the petitioner could be executed before appointed counsel could be found or before that counsel could undertake the task for which he was appointed. The habeas process need not tolerate the possibility of such a perverse absurdity."

Brown v. Vasquez, 952 F.2d 1164, 1169 (9th Cir. 1991).

The Court of Appeals affirmed the order of the district court denying Petitioner a stay of execution and the obligatory appointment of counsel pursuant to 21 U.S.C. § 848(q)(4)(B). The Court of Appeals adopted the reasoning of the district court:

A United States Court may not stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to perfect or effectuate its judgments. 28 U.S.C. § 2283. Such an act of Congress exists in the form of 28 U.S.C. § 2251, but it authorizes stay only by a court before which a habeas corpus proceeding is pending. No habeas corpus proceeding was pending before the district court and none is pending here. . . . Federal Rule of Civil procedure 3 makes it clear one commences a civil proceeding by filing a complaint with the court. That has not been done. We not view the motion for stay and for appointment of counsel as the equivalent of an application for habeas relief. . . . We do not . . . share the view of the Ninth Circuit in [Brown v. Vasquez, 952 F.2d 1164, 1166 (9th Cir. 1991), cert. denied, 112 S. Ct. 1778 (1992),] that the filing of the motions at issue is sufficient to meet the requirement of § 2251 that a habeas proceeding be "pending" before we may stay state court proceedings.

McFarland v. Collins, \_\_\_ F.2d \_\_\_, No. 93-1954 (5th Cir. October 26, 1993) (per curiam) (emphasis added).

Thus, of three federal Circuits that have addressed the precise issue discussed by the Court of Appeals, the Fifth and Eleventh Circuit have held that a formal habeas "petition" must be filed in order to afford a federal habeas court with jurisdiction to stay an execution and the third, the Ninth Circuit, has held that a federal habeas court may stay an execution without such a formal filing in the case of an indigent *pro se* prospective habeas petitioner. See also In re Lindsey, 875 F.2d 1518, 1519 (11th Cir. 1989) (requiring the filing of a formal habeas "petition"). In addition, at least two federal district court decisions are in accord with the Ninth Circuit. See Mooney v. Collins, No. 6:92CV254, unpublished slip op. at 2 (E.D. Tex. April 30, 1992) (quoting Brown v. Vasquez, 952 F.2d at 1165); Steffen v. Tate, No. C-1-92-495, unpublished slip op., 3-4 (S.D. Ohio June 18, 1992) ("The Court is faced with the imminent prospect that unless it acts promptly to grant petitioner's request, [for a stay] petitioner will be executed without ever obtaining federal review of his constitutional claims. The Court strongly believes that petitioner is entitled to such review, and nothing in McCleskey or any other decisions of the United States Supreme Court is to the contrary.").

Moreover, it should be noted that this is not a routine "circuit split." These three Courts of Appeals together contain the majority of large death penalty jurisdictions in the United

States.<sup>1</sup> The states in the Fifth and Ninth Circuit also are notorious for their poor record in providing post-conviction habeas counsel for indigent unrepresented death row inmates. See Marcia Coyle et al., Fatal Defense, NATIONAL LAW JOURNAL, June 11, 1990. Thus, this circuit split will repeatedly present itself to this Court in the foreseeable future. Thus, the Court should grant certiorari now in order to resolve the issue once and for all.

**II. THE COURT OF APPEALS, IN ITS RUSH TO JUDGMENT, ENTIRELY IGNORED PETITIONER'S ARGUMENTS INVOKING THE ALL WRITS ACT AND VARIOUS CONSTITUTIONAL PROVISIONS.**

As disturbing as the Court of Appeals' cursory analysis of the 28 U.S.C. § 2251 jurisdictional issue was the Court's failure to address Petitioner's arguments relating to the All Writs Act and various constitutional provisions that may trump the Anti-Injunction Act, assuming it is otherwise applicable. Such a "rush to judgment" mentality has increasingly been evident in capital habeas cases decided by the Fifth Circuit. See, e.g., Gosch v. Collins, \_\_\_ F.2d \_\_\_ (5th Cir. September 16, 1993), cert. pending (petition filed September 16, 1993). At the very minimum, this Court should issue a stay, vacate the judgment of the Court of Appeals, and remand for more careful consideration.

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<sup>1</sup> The Ninth Circuit contains California. The Fifth Circuit contains Louisiana and Texas. The Eleventh Circuit contains Florida and Georgia.

**III. THE CONTINGENCY OF A STAY BY THE FIFTH CIRCUIT**

By force of circumstances, late this afternoon Petitioner filed a perfunctory habeas corpus "petition" in the district court. Counsel has been informed orally that, while the petition has not been denied, the accompanying motion for a stay has been denied by the district court. Counsel has not yet been forwarded the order. The potential that, as a result, the Fifth Circuit will grant a stay should not keep this Court from acting on this petition. Notably, the case number assigned to the perfunctory petition filed is No. 4:93-CV-723-A. The district court case number is the instant case is No. 4:93-CV-714-A. Thus, any action in cause No. 4:93-CV-723-A will not moot the issues presented in the instant case.

More importantly, as a matter of this Court's mootness doctrine, even assuming that the Fifth Circuit ultimately did in fact enter a stay and appoint counsel, that occurrence would not moot the issues in the instant case because they are capable of repetition yet evading review. See generally Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, § 3-11, at 89-90 (1988).

**CONCLUSION**

For the foregoing reasons, this Court should grant certiorari and enter a stay of execution.

Respectfully submitted,

**FRANK BASIL MCFARLAND**

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Temporary counsel for Petitioner Only for Purposes of Filing this Petition for Writ of Certiorari

\* Counsel of record and member of Supreme Court Bar

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of this pleading has been faxed to:

Enforcement Division  
Office of the Attorney General  
209 West 14th Street  
Price Daniel, Sr. Building  
8th Floor  
Austin, TX 78701,

this 26th day of October, 1993.

Mandy Welch  
*by agent permiss*  
*BS Newton*

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

FRANK BASIL MCFARLAND

Petitioner,

VS.

JAMES A. COLLINS, DIRECTOR,  
TEXAS DEPARTMENT OF CRIMINAL  
JUSTICE, INSTITUTIONAL  
DIVISION

Respondent.

NO. 4:93-CV-723-A

**ORDER**

Came on to be considered in the above styled and numbered action the motion of petitioner, Frank Basil McFarland, ("McFarland") for leave to file amended habeas petition. After having reviewed the motion, the court concludes that it is without merit. Moreover, the motion is not accompanied by a proposed amended petition as required by Rule 5.2(b) of the Local Rules of the United States District Court for the Northern District of Texas. Therefore,

The court ORDERS that such motion of McFarland be, and is hereby, denied in its entirety.

SIGNED October 26, 1993.

JOHN MCBRYDE  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

NANCY DOHERTY, CLERK  
By [Signature]  
Deputy

FRANK BASIL MCFARLAND           §  
  §  
          Petitioner,               §  
  §  
VS.                                 § NO. 4:93-CV-723-A  
  §  
JAMES A. COLLINS, DIRECTOR,     §  
TEXAS DEPARTMENT OF CRIMINAL   §  
JUSTICE, INSTITUTIONAL         §  
DIVISION                           §  
  §  
          Respondent.             §

ORDER

Came on to be considered in the above styled and numbered action the motion of petitioner, Frank Basil McFarland, ("McFarland") for stay of execution. The court concludes that the motion for stay should be denied.

On November 15, 1989, McFarland was convicted of capital murder and sentenced to death in the Criminal District Court Number Three of Tarrant County, Texas, the Honorable Don Leonard presiding. On September 23, 1992, McFarland's conviction was affirmed by the Texas Court of Criminal Appeals. McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992). On June 6, 1993, McFarland's petition for writ of certiorari to the United States Supreme Court was denied. McFarland was represented by counsel at each of the above mentioned stages. On August 16, 1993, Judge Leonard entered an order scheduling McFarland's execution for September 23, 1993. On June 7, 1993, Judge Drago, sitting for Judge Leonard, ordered McFarland's execution date changed to

October 27, 1993. On October 22, 1993, McFarland filed in this court under docket number 4:93-CV-714-A motions (i) for stay of execution and request for appointment of counsel and (ii) for leave to proceed in forma pauperis. On October 25, 1993, the court denied McFarland's motions on the basis that the court did not have jurisdiction to grant them because there was not a habeas corpus proceeding before the court. McFarland has not sought habeas relief from any state court.

At approximately 5:45 p.m. on October 26, 1993, McFarland filed a petition for writ of habeas corpus and a motion for stay of execution, which were filed under docket number 4:93-CV-723-A. The initial matter to be considered by the court is whether the stay should be granted. McFarland does not have the right to an automatic stay pending his first federal habeas corpus petition, regardless of the merits presented. Autry v. Estelle, 464 U.S. 1, 2 (1983). "The granting of a stay should reflect the presence of substantial grounds upon which relief might be granted." Barefoot v. Estelle, 465 U.S. 680, 695 (1983). As the Fifth Circuit noted in McFarland v. Collins, No. 93-1954 (5th Cir. October 26, 1993), McFarland must show, if not a probability of success on the merits, at least a substantial case on the merits when a serious legal question is involved.

In his petition, McFarland states as his only claim for relief: "The admission of hypnotically-enhanced testimony was a deprivation of petitioner's rights to confront witnesses, to the effective assistance of counsel, and to due process of law."

Petition for writ of habeas corpus, 3. The petition briefly touches on the alleged deprivation of confrontation and denial of due process, but does not contain any discussion of alleged ineffective assistance of counsel.<sup>1</sup>

The court has conducted an independent review of the September 23, 1992, opinion of the Texas Court of Criminal Appeals on McFarland's direct appeal of his conviction and sentence<sup>2</sup>. McFarland raised on appeal the issues of (i) the trial court's failure to make findings of fact and conclusions of law in ruling on the admissibility of the testimony in question ("first issue") and (ii) failure to hear testimony from McFarland's expert ("second issue"). He did not raise the issue now presented that he was denied effective cross examination and due process. Thus, McFarland did not begin to exhaust his state court remedies as to that issue. Therefore, that issue cannot provide basis for granting habeas corpus relief. Picard v. Conner, 404 U.S. 270, 275-76 (1971); Thomas v. Collins, 919 F.2d 333, 334 (5th Cir. 1990).

The first issue does not raise a claim of constitutional magnitude. As to the second issue, McFarland's petition does not

<sup>1</sup>Based on the very facts recited by McFarland in his petition, a claim of ineffective assistance would not stand on the ground alleged. See Strickland v. Washington, 466 U.S. 668, 687 (1984). In any event, McFarland did not raise this issue on direct appeal nor did he exhaust available state habeas corpus remedies in this regard. Therefore, the court is foreclosed from considering the issue.

<sup>2</sup>See McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992), cert. denied, 113 S. Ct. 2937 (1993).

suggest any legal harm that he has suffered as a result of the state's failure to hear testimony from his expert.

Moreover, as to all theories urged in the petition, the court notes that the trial court found that "the hypnosis neither rendered the post hypnotic memory untrustworthy nor substantially impaired the ability of the opponent to test the witness' recall by cross examination." S.F. vol. 30, 575. Section 2254(d) provides that the fact finding of the state court "shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear" that certain conditions enumerated therein exist. 28 U.S.C. §2254(d). McFarland has not made any allegation that would suggest that the trial court's findings should not be accepted by the court.

Furthermore, the Fifth Circuit noted that "even if McFarland's pleadings are characterized as a federal habeas petition, the district court would be obliged to dismiss it for failure to exhaust the claims." McFarland v. Collins, No. 93-1954, slip op. at 3, n.1.

For the reasons stated above, McFarland has not satisfied the standard expressed by the United States Supreme Court in Barefoot. Therefore,

The court ORDERS that the motion of McFarland for stay of execution be, and is hereby, denied.

SIGNED October 26, 1993.

JOHN MCBRYDE  
United States District Judge

Filed  
10/26/93  
H. W. V. G.

**S S S S S S S S S S S S**

ORDER

JOHN McBRYDE  
United States District Judge